STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

Appeal from the:

Court of Appeals N° 232706
Circuit Court N° 00-037979-CE Honorable Garfield W. Hood

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

Supreme Court N° 121890

v

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP,

Defendants- Appellants

and

MICHIGAN DEPT OF ENVIRONMENTAL QUALITY, a Michigan Executive Agency and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants.

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BRIEF OF *AMICI CURIAE*
WILLIAM G. MILLIKEN, LEAGUE OF WOMEN'S VOTERS *et al.*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici* filing this brief consist of William G. Milliken, the Governor of Michigan who in 1970 signed the Michigan Environmental Protection Act ("the MEPA") into law, and the following public interest, citizen-supported, nonprofit organizations: League of Women Voters of Michigan, Michigan Republicans for Environmental Protection, Michigan League of Conservation Voters, Michigan Audubon Society, The American Lung Association of Michigan, Doctors for Environmental Protection, West Michigan Environmental Action Council, Michigan Resource Stewards, Michigan Land Use Institute, Michigan Lake and Stream Association, Michigan Environmental Council, Michigan Division of the Izaak Walton League of America, Michigan Environmental Law Center, Petoskey Regional Audubon Society, Dwight Lydell Chapter of Izaak Walton League of America, American Association of University Women-Manistee Branch, The Sierra Club, Northern Michigan Environmental Action Council, East Michigan Environmental Action Council, Pere Marquette Watershed Council, Inc., Cadillac Area Citizens for Clean Air, Grand River Environmental Action Team, SEE-North, Portage Lake Environmental Association, Michigan Citizens for Water Conservation, and Michigan Steelhead and Salmon Fishermen's Association.

Former Governor Milliken, along with many of the organizations filing this brief were instrumental in getting the MEPA enacted in 1970. All of the *Amici* share a common concern and commitment to the protection of the environmental resources of this state.

The questions presented in this appeal and addressed in the proposed Brief *Amici Curiae* are of major jurisprudential significance to the State of Michigan and of particular significance to *Amici*, the public interest, and those concerned with democratic principles and environmental protection. Together, *Amici* have a total membership of over 200,000 Michigan citizens. These people and the *Amici* organizations have an obvious interest in the development of a clear and rational application of the constitutional, statutory and current law at issue, and recognize their obligation to assist the courts in cases involving questions of major significance.

THE QUESTION PRESENTED:

This Court framed the question presented on appeal as follows:

> Can the Michigan Legislature by statute confer standing on a party who does not satisfy the judicial test for standing as recognized by this Court in *Lee v Macomb County Board of commissioners?*

Defendant-Appellant Cleveland Cliffs would answer "No."

Defendant-Appellant Department of Environmental Quality would answer "Yes"

Plaintiffs-Appellees National Wildlife Foundation et al. would answer "Yes."

Amici William G. Milliken, League of Women Voters et al. answer "Yes."

INTRODUCTION

Art 4, § 52 of the Michigan Constitution of 1963 provides that:

> The conservation and development of the natural resources of the state are hereby declared to be of *paramount public concern* in the interest of the health, safety, and general welfare of the people. The *legislature shall provide* for the *protection of the air, water, and natural resources of the state from pollution, impairment, and destruction*. [Emphasis added.]

In 1970, responding to the above constitutional mandate, former Governor and *Amicus* William G. Milliken signed into law the Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* ("MEPA").[1] The question presented in this appeal involves the "citizen suit" provision of the MEPA. Specifically, can MEPA's citizen suit provision and the exercise of independent judicial power in deciding and granting declaratory or equitable relief to protect the air, water, and natural resources, or public trust, as mandated by Art 4, § 52 of the Constitution, be read as consistent with the separation of powers under Art 3, § 2 of our Constitution?

Amici submit the answer is "yes." The MEPA has been a constitutionally-based cornerstone for substantive and procedural environmental law. Rather than leave the responsibility for protecting the environment through the "command-control" regulations of bureaucracies, the legislature, in its political wisdom, imposed a substantive duty on private and public parties, alike, to prevent or minimize environmental degradation. *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975). This created the right of a citizens to enforce this duty where their interests under Art 4, § 52 and the MEPA have been threatened or harmed. This legislative pronouncement is both appropriate and constitutional.

First, the MEPA is a result of the constitutional mandate of Art 4, § 52 requiring *the Legislature* to provide for the protection of the air, water and natural resources of the state. Under

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[1]The Legislature has also responded with the passage of specific environmental laws that addressed lakes and streams, wetlands, and hazardous substances and contaminants that have been discharged to the environment: Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* ("ILSA"); Wetland Protection Act (now Part 303 of the Natural Resources and Environmental Protection Act), MCL 324.30301, *et seq.* ("WPA"); Natural Resources and Environmental Protection Act, MCL 234.20101 (Pollution Liability law).

the Michigan Constitution, therefore, the legislature has both the right and duty to provide a statutory framework for the protection of the state's environmental quality. Inherent in this power is to define how and when these protections may be enforced. The separation of powers doctrine requires the judicial branch to honor and respect the authority of the Legislature in this situation, and not to improperly infringe on its constitutional obligations. So long as a "controversy" exists pursuant to the statutory standards and requirement of the MEPA, there is a valid exercise of judicial power under Art 6, § 1 of the Constitution without violating the limitation of Art 3, Sec, 2.

Second, it follows that if the circuit court validly exercises judicial power under the MEPA, the judicial power may not be narrowed by the separation of powers under Art 3, § 2. The separation of powers is intended to ensure that the powers granted by the constitution to each branch of government are preserved, not infringed. If Section 1701 of the MEPA can be read as authorizing a valid exercise of judicial power under Art 6, § 1 to grant declaratory and equitable relief based on actual violation of the environmental standard, then the MEPA is both constitutional on its face and consistent with the separation of powers.

Third, if this Court is inclined to require a heightened standard for standing than what is provided for in the plain language of MEPA, Amici suggest, in the alternative, that the courts should fashion standing or other principles that are part of the courts' gate-keeping role to make sure that there is a "controversy between adverse interests." However, in doing so, the courts must consider the paramount public concern or interest in the state's environment enshrined by Art 4, § 52 and that the purpose of the MEPA is effectuated. In fashioning such principles regarding the assurance of a "controversy," the integrity of Art 3, § 2 is honored. In other words, this Court does not have to reach the constitutionality of Section 1701 of the MEPA under separation of powers. Rather, the Court can apply the relevant constitutional provisions in a manner that respects the integrity of each and further defines the common law of environmental quality that the courts have been charged to develop under the MEPA.

Accordingly, to establish a sufficiently adverse interest under the MEPA to assure there is a "controversy," *Amici* submit that a plaintiff would need to demonstrate the following: (1) that

she or he has some relationship in the air, water, and natural resources, or public trust of the State alleged to be threatened by defendant's conduct; (2) that plaintiff alleges that defendant's conduct has, will, or is likely to pollute, impair, or destroy such interest in the air, water, and natural resources or public trust; and (3) that the plaintiff's requested declaratory or equitable judgment or order will result in some prevention or minimization of such actual or likely pollution, impairment, or destruction.

Based on the above principles and a review of the affidavits filed by Appellees in the trial court, *Amici* submit that Appellees have made this demonstration of standing under the MEPA consistent with Art 4, § 52, Art 3, § 2, and Art 6, § 1 of the Constitution.

STATEMENT OF FACTS

The *Amici* adopt the Statement of Facts of Appellees and Appellants, except for the matters covered below. Although the question at issue on appeal involves one of standing to sue, it is important for the Court to understand the enormity of the environmental impacts at issue. The important question that the parties have been ordered to address, including who has the right to protect the public's paramount interest in the air, water, and natural resources under Mich Const. 1963, Art 4, § 52 and the Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* ("MEPA"), can not be decided in a vacuum.

The conduct at issue in this case involves a mining expansion proposal that would result in the destruction of over 87 acres of wetlands and one mile of cold water trout streams.[2] These streams are feeder streams for the Escanaba River, flowing from the Appellant Cleveland Cliffs Iron Company's expanded mining sites to the river. The Plaintiffs challenged the issuance of the permits under the relevant provisions of the NREPA, in part because the permits were issued while other feasible and prudent alternatives existed to the destruction of the wetlands and streams.

The Defendant-Appellant Cleveland Cliffs filed a motion to dismiss the Complaint in the Circuit Court based on a lack of standing principles. Plaintiff-Appellee NWF filed a response to the motion, including affidavits from three of its members that indicated they used and enjoyed the natural resources directly connected to those that were to be destroyed, and that their use and enjoyment of those resources would be adversely affected by the proposed project. In ruling on Defendant's motion, the trial court held that "while the two plaintiffs in this case certainly are capable of having standing in appropriate circumstances that they do not have standing in this situation." Appx, t, 324. The trial court's ruling prevented the evaluation of the feasible and

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[2]It is *Amici's* understanding that the expansion activities at issue have been completed during the time of he present appeal. However, the case is not moot because the trial court could order the Defendant to remediate the environmental damage they have done and restore the land back to its original condition. See *MGM Grand Detroit, L.L.C. v Community Coalition for Empowerment,* 465 Mich 303, 307-308; 633 NW2d 357 (2001).

prudent alternatives to the massive environmental destruction resulting from the project by procedurally shutting the door to the court on the Plaintiffs.

ARGUMENT

The MEPA establishes a statutory framework to meet the mandate of Article 4, Section 52 of the constitution, providing for the protection of the public's interest in the air, water and natural resources of the state. This statutory framework is consistent with the principles underlying the standing doctrine, including the separation of powers provision, as expressed by this Court in *Lee*. Therefore, Amici submit that this Court should affirm the Court of Appeals decision.

Amici also recognize that this Court may not agree with the above argument and analysis. Therefore, Amici also present an argument in the alternative that, should the Court require a heightened standard for standing than what is provided for in the plain language of MEPA, the Court should require a standing test as part of the courts' gate-keeping role to make sure that there is a "controversy between adverse interests."

A. STANDARD OF REVIEW

The question of standing is a question of law. *Lee v Macomb County Board of Com'rs*, 464 Mich 726; 629 NW2d 900 (2001). Question of law are reviewed *de novo*. *Id.*

B. SECTION 1701 OF THE MEPA, ENACTED BY THE LEGISLATURE PURSUANT TO THE CONSTITUTIONAL MANDATE OF THE MICHIGAN CONSTITUTION 1963, ART 4, § 52, IS CONSISTENT WITH THE LIMITATION OF SEPARATION OF POWERS IN MICHIGAN CONSTITUTION 1963, ART 3, § 2.

The MEPA was enacted by the Legislature as its "response to our constitutional commitment to the 'conservation and development of the natural resources of the state.'" *Ray*, 393 Mich 304.[3] Section 1701 of the MEPA provides in part:

> The attorney general *or any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred

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[3] Again, Art 4, § 52 provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and natural resources of the state from pollution, impairment, and destruction.

> or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1), emphasis added.]

Section 1703 creates a cause of action arising out of conduct that violates the paramount interest of the people in the environment and public trust:

> When the *plaintiff in the action* has made a *prima facie* showing that the *conduct of the defendant* has polluted, impaired, or destroyed or is likely to *pollute, impair, or destroy the air, water, natural resources, or the public trust in these resources*, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. [MCL 324.1703, emphasis added.]

Since MEPA's adoption thirty-three years ago, the courts have discharged their duty, and developed a substantial body of common law of environmental quality under the MEPA. This Court has decided issues arising directly under the MEPA citizen suit law in eight reported cases,[4] ranging from requiring a consideration of environmental impacts on major state highway projects,[5] requiring circuit courts to review agency actions de novo and make independent findings of fact regarding whether the MEPA standard has been violated,[6] reviewing the disposal site for PBB contamination,[7] or protecting the elk herd in the Pigeon River wilderness,[8] to recently enforcing permit requirements under soil erosion and sedimentation regulations to protect water resources.[9]

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[4]Westlaw Serach of "MEPA" and "Citizen Suit." *State Hwy Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974); *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975); *Daniels v Allen Industries*, 391 Mich 398; 216 NW2d 782 (1974);*Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979); *Michigan Oil v Natural Resources Comm'n*, 406 Mich 1; 276 NW2d 141 (1979); *PBB Action Committee v Department of Natural Resources*, 403 Mich 216; 268 NW2d 240 (1978); *Poltetown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981); *Nemeth v Abonmarche Development Co*, 457 Mich 16; 576 NW2d 641 (1998).

[5]*Vanderkloot, supra.*

[6]*Ray, supra.*

[7]*PBB Action Committee, supra.*

[8]*Environmental Action Council, supra.*

[9]*Nemeth, supra.*

The Court of Appeals has decided or referenced the MEPA in well over seventy reported cases.[10] In each instance, citizen groups or individual citizens have filed actions to make sure the constitutional standard in the MEPA is implemented or not violated. While there has not been a rush of cases, the MEPA has fulfilled the constitutional and legislative mandate of shaping a climate of environmental protection without direct interference with the regulatory enforcement by the agencies. Indeed, in most instances, the supplemental aspect of the MEPA has aided the agencies in meeting their own responsibility "to prevent or minimize degradation of the environment." *Ray*, 393 Mich 306.

It is within this context that the Court must evaluate whether the Legislature's response to its constitutional mandate by crafting MEPA is consistent with the separation of powers principles underlying this Court's opinion in *Lee*. Amici submit that the "any person" standard is derived directly from the constitution, and does not violate the separation of powers doctrine. To the contrary, restricting the Legislature's authority to meet its constitutional mandate in Art 4, §52 would be the real violation of the separation of powers doctrine in this case.

1 The Constitutional Provisions at Issue Must Be Given their Plain and Common Meaning as Understood by the People

Justice Cooley articulated the lens by which the courts should view the people's will as expressed in *their* constitution:

> A Constitution is made for the people by the people . ... [T]he interpretation that should be given it is theat which reasonable minds, the great mass of the people themselves would give it. ... it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." [Cooley's Const. Lim. 81, quoted by Justice Black in *Buback v Romney*, 380 Mich 209, 231, 156 NW2d 549 (1968), citing May Topping, 65 W Va 660, 64 SE 848.]

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[10] *Id.*

This Court follows a threefold analysis in construing constitutional provisions, based on the premise that "[c]onstruction of a constitution is a special situation where technical rules of statutory construction do not apply," *Traverse City School District v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971); *State Hwy Comm'n v Vanderkloot*, 392 Mich 159, 179; 220 NW2d 416 (1974):

> (1) The primary rule is that the language is to be judged by 'common understanding.'
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> * * *
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> (2) Secondarily, the circumstance surrounding the adoption of the constitutional provisions and the purpose sought to be accomplished may be considered.
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> (3) Finally, wherever possible an interpretation that does not create constitutional invalidity is preferred.[11]

2. Protection of the State's Natural Resources is of Paramount Public Interest

The "common understanding" of Art 4, §52 is that the air, water, and natural resources are of paramount *public* interest, and that the Legislature "shall" pass laws to protect this interest from "pollution, impairment, and destruction" in order to protect "the health, safety, and general welfare *of the people*." The "any person" language of the MEPA is a direct reflection of this constitutional language and its common understanding.

The "circumstances surrounding" the adoption of Art 4, §52 support this meaning. The official Convention comment states:

> This is a new section recognizing the *public* concern for the conservation of natural resources and calling upon the legislature to

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[11]In addition, this Court has made it clear that it will not reach a constitutional question if it can decide a case on non-constitutional grounds. *Judges for Third Judicial Circuit v Wayne County*, 15 Mich App 713; 167 NW2d 337; remanded by 383 Mich 10; 172 NW2d 436, superceded 386 Mich 1; 190 NW2d 228, *cert den*; 405 US 923; 30 Led 794; 92 Sup Ct 961 (1969) ("... courts will not grapple with a constitutional issue except as a last resort").

> take appropriate action to guard *the people's* interest in water, air, and other natural resources. [Emphasis added.][12]

Art 4, § 52 was introduced at the Convention as Proposal 125,[13] and finally adopted with two amendments to the Committee on Style which reported it in the form as now appears in the Constitution.[14] The first amendment added the words "to regulate the use and development," so it read as follows:

> The *State holds a paramount interest* in the air, water, and natural resources of the state, in the interests of the health, safety, and welfare of the people. The legislature shall enact appropriate legislation to protect the air, waters, and other natural resources of the state from pollution, impairment, and destruction, and to regulate the development and use thereof, so that the interest of the people may be preserved.[15]

The second amendment changed the first sentence of Proposal 125 by adding the word "public" before the word "paramount"[16] as Art. 4, § 52 now reads.[17]

The common meaning of Art 4, § 52 is that it established a public interest in the air, water, and natural resources, and directed the Legislature to pass laws to protect this interest. This Court explained in *Vanderkloot*, that Art 4, §52 "created a Mandatory duty on the part of the legislature to act to provide for the protection of the air, water and other natural resources from pollution, impairment, and destruction." 392 Mich 182. This Court has also held that the MEPA adopted the "pollution, impairment, or destruction" standard from Art 4, § 52, and that the standard is

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[12]See Constitution, Art 4, § 52, MCLA (West Publishing, 2003), p. 67.

[13]State of Michigan, Constitutional Convention, 1961, Official Record, p. 2602.

[14]Id., at 2618.

[15]Id., at 2603, 2607.

[16]Id., at 2609-2610. The second amendment was added to make clear that the interest at stake was the public interest, and not an interest of the state in a proprietary sense.

[17]It should be noted that under the rules of the Convention, the Committee on Style and Drafting had no power to change the substance or meaning of any proposal, but only its arrangement, sequence, and phraseology. *Citizens Research Council of Michigan*, Convention Procedures, Council Comments on Con-Con (Jan. 31, 1962).

constitutional. *Ray*, 393 Mich 306, n 9 and 10. Similarly, the "any person" standard in section 1701 of the MEPA is derived from and is consistent with the language of Art 4, §52.

Importantly, the MEPA's statutory scheme is designed to ensure that a "controversy" exists before a reviewing court may grant a plaintiff relief. Section 1703 requires a MEPA plaintiff to establish a prima facie showing of pollution, impairment or destruction of natural resources. If a defendant's conduct violates this constitutionally based standard, then and only then is the judicial power of the court triggered to grant a plaintiff relief. This provision ensures that there is inherently a controversy over the pollution, impairment or destruction of natural resources in any MEPA suit.

3. Legislative Powers Under the Michigan Constitution are Broad and Comprehensive

In looking at the "constitutional architecture" of the federal and Michigan Constitutions, it is important to keep in mind that the federal courts are courts of limited jurisdiction, while Michigan courts are courts of general jurisdiction. As such, the federal standing doctrine has developed from the language of Article III's case or controversy requirement.

In a number of cases involving the case or controversy clause of Art III, the United States Supreme Court has recognized that courts must exercise powers that are truly judicial and confined to controversies. *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 Lt Ed 246 (1911). And in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S. Ct. 2130 (1992), the Court, through the opinion of Justice Scalia, tied Art. III's case or controversy to the principle separation of powers. "The law of Art. III standing is built on a single basic idea- the idea of separation of powers." *Raines v Byrd*, 521 US 811; 820, 117 S Ct 2312 (1997), quoted in *Lee*, *supra* at 736-737.

Under Michigan's "constitutional architecture whereby government powers are divided by three branches," *Lee*, *supra,* at 735, the decisions of the United States Supreme Court under Art III may be useful, but they can not determine what constitutes a "controversy" within in the meaning of Art 6, § 1 of the Constitution of 1963, or whether a MEPA action, if confined to a

"controversy," satisfies the express separation of powers limitation of Art 3, § 2. While separation of powers is an important limitation in Michigan, it does not have to be read in to the Constitution through the judicial power's definition of "controversy." *Daniels*; *Washington-Theater*, *supra*. Rather it stands alone as a limitation on the power of each branch of government. But so long as each branch of government exercises its power within the power granted to it, it has not violated the separation of powers. In this way, unlike the federal constitutional structure, the separation of powers under Michigan's Constitution is not derived from an implied limitation that is inherent in the meaning of "controversy." Rather, the judicial power is limited directly by Art 3, § 2 itself.

Legislative powers exercised under an explicit directive in the Constitution should be construed to be "broad and comprehensive,"[18] and are presumed valid and constitutional in the absence of a violation of such a limitation. *In re Brewster Street Housing Site in City of Detroit*, 291 Mich 313 (1939); *Harsha v City of Detroit*, 261 Mich 586; 246 Mich 849 (1933), *Thomas v Board of Supervisors of Wayne County*, 214 Mich 72; 182 NW 417 (1921), *Cummings v Garner*, 213 Mich 408; 182 NW 9 (1921). Moreover, it is perfectly acceptable for some functions of the separate branches to overlap. "The doctrine of separation of powers 'has never been interpreted in Michigan as meaning there can never be any overlapping of functions between branches or no control by one branch over the acts of another.'" *Judicial Attorneys Assoc. v State of Michigan*, 459 Mich 291, 316-317; 586 NW2d 894 (1998), Taylor, J. dissenting, citing the court of appeals dissent of then Judge Markman. See also *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752; 330 NW2d 346 (1982).

In affirming Michigan's use of declaratory judgment law, this Court interpreted state legislative powers to be broader than the federal government when it comes to addressing significant societal problems:

> This historical argument, however much it may circumscribe a government of granted powers, is not applicable to a sovereign state whose inherent powers enable it to attempt solution of any social problem arising from current conditions, and which may adventure

[18]Mich Const 1963, At 4, § 1. All legislative power is vested in the Legislature, but of course this is subject to power of citizens to enact and reject laws through initiative and referendum. Mich Const 1963, Art 2, § 9.

> into experiment for the public welfare. [*Washington-Detroit Theater Co v Moore*, 249 Mich 673, 680; 229 NW 618 (1930).]

This Court has given great deference to the Legislature in its enactment of laws for assigning priorities and addressing societal complexities. *O'Donnell v State Farm Mutual Ins. Co*, 404 Mich 524; 273 NW2d 829, app dis, 44 US 803; 100 S Ct 444; 62 L Ed2d 263 (1979), including the power to change the common law. *People v Young*, 418 Mich 1; 340 NW2d 805, opinion after rmd 425 Mich 470; 391 Mich 270 (1983). The courts must not substitute their policy choices or ideas for those of the legislature. It is a "fundamental principle" under the separation of powers that "it is the constitutional duty of this court to interpret the words of the lawmakers, in the case the Legislature, and *not* substitute our own policy preferences..." *Robertson v Damiler-Chrysler Corp.*, 465 Mich 732, 758; 641 NW2d 567 (2002)(emphasis in original). This is especially the case because of the Judiciary's role in deciding cases involving the separation of powers doctrine:

> We should always exercise judicial review with great care to be sure that we are not intruding into political questions that are reserved to the Legislature. This venerable rule of judicial prudence is even more important when we intervene into matters that raise questions about the judiciary's inherent powers because of the natural inclination toward self-interest. Indeed, because we are charged with maintenance of the constitutional design so as to preserve separation of powers, we should be even more sensitive in matters declaring judicial prerogatives in order to avoid compromising our authority to speak and be respected as impartial arbiters of the constitution. [*Judicial Attorneys Assoc.*, 459 Mich 316-317, Taylor, J. dissenting.]

Amici submit that the constitutionality of the MEPA and the courts' thirty-years of developing common law of environmental quality should be upheld, particularly in light of the constitutional mandate of Art 4, § 52, and the rules of construction giving common meaning and force to the constitutional will of citizens. The MEPA does not grant the circuit courts any judicial power to take over or block regulatory enforcement of environmental or other laws by the executive branches of government. It creates "only a procedural cause of action" and "imposes substantive duties." *Vanderkloot,* 395 Mich 185. Circuit courts can only apply the law and exercise power when the constitutional standard of "pollution, impairment, or destruction" has been violated by

the defendant's conduct. And, in doing so, they are acting "supplemental," MCL 324.1706, to the coordinate powers of the executive branch to prevent or minimize environmental degradation.

4. Section 1701 is Consistent With the Common Meaning of Both Art 3, § 2 and Art 6, § 1 of the Constitution

As noted above, Art 4, § 52 of the Constitution mandates that "the legislature shall" enact a law to protect the paramount public interest in the air, water, natural resources and public trust from pollution, impairment, or destruction. The Legislature responded by adopting the MEPA and prohibiting the conduct of a defendant that is shown by a plaintiff to violate, *prima facie*, this constitutional standard. Also, as noted the legislature elected the MEPA to supplement, not interfere with, the enforcement of existing laws and regulations. As such, the MEPA is a constitutionally-based law under Art 4, § 52, and, therefore, falls within the "except as expressly provided in this constitution" clause of Art 3, § 2.

In *Lee*, the Court, quoting Justice Cooley in *Sutherland v Governor*, 29 Mich 320; 324 (1874), emphasized that the doctrine of separation of powers "has caused this Court to be vigilant in preventing the judiciary from usurping the powers of the political branches:"

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.
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> * * *
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> It has long been a maxim in this country that the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist; and if the Legislature could in like manner override executive action also, the government would become only a despotism under popular forms. On the other hand it would be readily conceded that no court can compel the Legislature to make or refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the

> duty to take it made ever so clear by the constitution or the laws. [29 Mich 324-325, (1874)]

In *Sutherland* such vigilance prevented a direct action against the Governor for mandamus by a private contractor claiming he had performed under a statute granting him the right to a conveyance of state land. In *Dearborn Twp v Dail*, 334 Mich 673; 55 NW2d 203 (1952), the Court precluded the legislature's direct effort to confer justices of legislative power authorizing them to sit on township boards. In *Schwartz v City of Flint*, 426 Mich 295, 308-309; 395 NW2d 678 (1986), the Court prohibited courts, in the exercise of judicial power, from rezoning property to a new use after declaring a zoning ordinance invalid. In all of these cases, the legislative or governmental power complained of was an action by one branch that directly took over or infringed on the given powers of the other branch. Or, as in *Sutherland*, the lawsuit was filed by a private citizen for mandamus to order the Governor to do something he had the discretion not to do. See also *Lee*, *supra*.

But there generally is no violation of separation of powers if a branch of government exercises powers solely within those vested in it by the constitution. For example, in *Washington-Theater*, the Court held that a declaratory judgment law that granted a circuit court to determine facts and enter a binding judgment in an "actual controversy" fell within the judicial powers granted by Art 6, § 1. See also *Crawford v Department of Civil Service*, 466 Mich 250; 645 NW2d 6 (2002) (standing exists for "any Michigan citizen to challenge alleged violations of Art 11, § 5" of the constitution because of the specific constitutional language).

Similarly, when the Legislature passed the MEPA it acted solely within its powers granted by the mandated of Art 4, § 52. It chose, in its legislative wisdom, to create a duty and cause of action to protect the states's paramount interests in the environment from harm. It granted the right of "any person to maintain an action for declaratory and equitable relief" to maintain this cause of action to enforce this duty. The Legislature did not grant the courts the power to pass laws or the power to issue or not issue permits under existing environmental laws and regulations. Rather it *supplemented* those existing procedures with a cause of action aimed at "conduct" likely to "pollute, impair, or destroy" the paramount public interest. Like the declaratory judgement law

in *Washington-Theater*, the courts have been granted to do what they have been given to do by the Constitution: hear, determine, adjudge, and grant binding relief between the parties in a "controversy." *Daniels, supra*. This is not a direct and substantial usurpation or infringement of the powers of a political branch. Section 1701 and the power of courts to hear MEPA citizen suits within the limits and parameters of Section 1703(1) and the cause of actions created does is wholly consistent with the separation of powers of Art 3, § 2.

While Art 4, § 52 demanded the enactment of laws to protect the paramount public interest of citizens in the environment, it left to the Legislature the choice or political wisdom of just how to do it. The power to enact environmental laws does not necessarily insulate the specific exercise of that power from other constitutional limitations such as Art 3, § 2 or Art 6, § 1. But the fact that the MEPA is constitutionally based and has been enacted to specifically implement the purpose of Art 4, § 52, and that the MEPA establishes a duty to prevent or minimize environmental degradation from violation of the constitutional standard, creates a very high presumption of constitutionality, and the MEPA should be viewed as constitutional unless there is an infringement of the powers of another branch, such as the executive, is direct, real, and substantial. If it is only incidental and its application is within the scope of the judicial power, then the MEPA should be upheld under the recognition by Madison that incidental powers of government are shared as coordinate branches of government. The incidental sharing of power while each branch acting within its own sphere is not "usurping the powers of the political branches." *Lee*, 463 Mich at 737.

Citizen suit provisions, like the MEPA,[19] were enacted to "supplement rather than supplant" governmental enforcement or prosecutorial discretion under existing laws and regulations. The MEPA, which was drafted by Professor Joe Sax, then at the University of Michigan Law School,

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[19]MEPA has been evaluated in depth. Haynes & Smary, Eds, *The Michigan Environmental Protection Act*, Chpt. 2, *Michigan Environmental Law Deskbook* (ICLE 1992), pp. 2-1 to 2-41; Sax & Connor, *Michigan's Environmental Protection Act: A Progress Report*, 70 Mich L. Rev 1004 (1972); Sax & Dimento, *Environmental Citizen Suits: Three Years Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1 (1974); Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law for Citizen Suits*, 53 U Det J Urban Law 589 (1976); Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model*, 7 Harv Envtl L Rev 107 (1983); Olson, *Michigan Environmental Law*, 184-248; Olson, *The MEPA: An Experiment that Works*, 1985 MBJ 181 (February, 1985).

and ushered in with the leadership of Governor William Milliken, became the model for citizen suit provisions throughout the country.[20]

Rather than impinge on the executive branch's decision, through citizen suits, the legislature and the people have brought about a important check to protect the public's interest in the natural resources of the State. Citizen suits create a climate for direct resolution of controversies involving the pollution, impairment or destruction of natural resources. Because section 1701 of the MEPA allowing such citizen suits is derived from the mandate of Art 4, § 52 of the Michigan Constitution, and because the MEPA's statutory framework for these suits ensures that there is a legitimate controversy for the court to adjudicate, the MEPA is consistent with this Court's pronouncement in *Lee* and the separation of powers doctrine.

C. IN THE ALTERNATIVE, IF THE COURT IS INCLINED TO OVERTURN THE DECISION OF THE COURT OF APPEALS, IT SHOULD IMPOSE STANDING REQUIREMENTS IN ORDER TO ASSURE LAWSUITS ARE "CONTROVERSIES BETWEEN ADVERSE PARTIES"

Amici strongly believe that Section 1701 of the MEPA is consistent with this Court's opinion in *Lee* and the separation of powers doctrine for the reasons outlined above. However, *Amici* also recognize that the Court's order and limited grant of review in this case may indicate that the Court is leaning toward overturning the Court of Appeals decision. If the Court is so inclined, it must do so in a way that preserves the constitutionality of the citizens suit provision in Section 1701. In other words, the Court should rule that the citizen suit provision of MEPA is constitutional, but subject to the standing requirements of *Lee, Lujan* and other relevant standing case law.

Constitutional jurisprudence requires that the Court construe a statutory provision as constitutional if at all possible.

> Further, "[i]t is one of the oldest and most well-established tenets of our jurisprudence that legislative enactments enjoy a presumption of

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[20]Several states have adopted citizen suit laws based on the MEPA: E.g., Connecticut Environmental Protection Act, C.G.S.A. Secs. 22a-16; Florida Environmental Protection Act, West's F.S.A. 403.12 et seq., West's F.S.A. Constitution, Art, §3(b)(1); Minnesota Environmental Policy Act, M.S.A. § 116B.01 et seq.

> constitutionality." *Gora v Ferndale*, 456 Mich 704, 719; 576 NW2d 141 (1998). Courts are required to give the "presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears." *Caterpillar Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). [*Judicial Attorneys Assoc.*, 459 Mich 311, Taylor, J. dissenting.]

In this case, Section 1701 of the MEPA can be construed as constitutional and consistent with both *Lee* and the separation of powers doctrine. The Court can require a plaintiff to meet the *Lee* standing test pursuant to Art 6, § 1 of the Michigan Constitution as part of its inquiry as to whether there is a "controversy" to adjudicate. Such a holding preserve the citizens suit provision of the MEPA as constitutional while also applying the standing principles in *Lee*.[21]

1. Article 6, § 1 of the Michigan Constitution of 1963 Vests Courts with Judicial Power to Assure Lawsuits Are Controversies Between Adverse Parties

Justice Cooley defined judicial power "to adjudicate upon and protect the rights and interests of citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."[22] Black's Law Dictionary defines "judicial power" as "[p]ower that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes, and applies the law."[23] Michigan case law recognizes judicial power as the power "to hear and determine controversies between adverse parties, and questions in litigation," *Daniels v People*, 6 Mich 381, 388 (1859), and "to decide, but to make binding orders or judgements." *Underwood v McDuffee, 15 Mich 361, 368 (1867).*

Judicial power does not include the legislature's conferral of power to the courts to decide abstract questions for the guidance of suitors, *Street R. Co. of East Saginaw v Wildman*, 58 Mich

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[21] Again, this inquiry is only necessary to the extent that the Court does not agree with *Amici*'s argument in section B, above.

[22] *Cooley on Constitutional Limitations* (7th Ed.) 132.

[23] *Black's Law Dictionary*, 6th Ed. p. 849. See also "judicial function" at p. 848, and "judicial business" as the "application of the mind and authority of the court to some contested matter," at 847.

286 (1885) (an injunction against the moving of a building already moved was refused), matters that are moot or merely advisory, *Anway v Grand Rapids Ry Co.*, 211 Mich 592, 622; 179 NW 350 (1920),[24] or disputes that are not ripe. *Mudel v Great Atlantic & Pacific Tea Co.*, 462 Mich 691, 738; 614 NW2d 607 (2002). "To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." *Anway*, *supra*, 211 Mich at 626, quoting *Cooley on Constitutional Limitations* (7th Ed.) 132; *Washington-Detroit Theater Co v Moore*, 249 Mich 673, 676, 229 NW 618 (1930). In *Washington-Detroit Theater*, this Court upheld, unanimously, the validity of a revised Declaratory Judgment Law because the law required an "actual controversy," *Id.*, 249 Mich at 676, 683-684,[25] reasoning that

> There is no constitutional restriction on the power of the Legislature to recognize the complexity of modern affairs, and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wronging or threatening to wrong the other. ... When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is res adjudicata of the issue in any other proceeding in court in which it may be involved, what else can the decision be but the exercise of judicial power?"

Similarly, a lawsuit filed by "any person[26]" under the MEPA prohibits "conduct" that is "likely" to degrade the identified environmental interest at stake. That conduct can be based either on defendant's failure to obtain or the violation of a permit, *Nemeth v Abonmarche Development Co*, 457 Mich 16; 576 NW2d 641 (1998), or actual or proposed conduct or development *prima facie* will or is likely "pollute, impair, or destroy." MCL 324.1703(1); *Ray*, 393 Mich 309-312. A MEPA suit also can be brought against a governmental agency for approving conduct by "permits to drill ... as conduct alleged to be likely to pollute, impair, or destroy" the environment,

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[24]Except for specific advisory powers granted to the Court under the Constitution. Mich Const. 1963, Art 3, § 8.

[25]Under a previous version of the law, this Court refused to permit the courts to hear matters that were moot or merely advisory. *Anway v Grand Rapids Ry Co.*, *supra.*,

[26]"Person" means "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 324.301(g).

Environmental Action Council v Natural Resources Com'n, supra, 459 Mich at 751, or for failure to consider and determine likely effects and alternatives to the proposed conduct. *Vanderkloot*, 392 Mich at 186-189; *Committee for Sensible Land Use v Garfield Twp*, 124 Mich App 559; 335 NW2d 216 (1983).

Moreover, when a MEPA suit is brought directly against a non-governmental defendant based on an alleged pollution, impairment, or destruction, the suit does not directly infringe on the powers of the governmental agency. And, when filed also against the agency, the suit simply alleges that the agency's failure to comply with its duty to protect the environment from degradation is "conduct" also alleged to pollute, impair, or destroy. Unlike the federal citizen suits that question government violation of duties to consult and issue opinions under the Endangered Species Act ("ESA"), 16 USC 1540(g) ,[27] in *Lujan v Defenders of Wildlife*, *supra*, and *Bennet v Spears*, 520 US 154; 117 S Ct 154 (1997), the MEPA merely proscribes conduct that violates a *constitutional standard* designed to protect the paramount interests of citizens in the environment and creates a cause of action to enforce it. If the U.S. Supreme Court recognizes the sound Congressional purpose in authorizing "private attorney general" or citizen suits against the federal government, *Spears*, 520 at 164-166, then this Court is on solid ground when it does so in the backdrop of Art 4, § 52 and MEPA.

For these reasons, the MEPA grants courts only the power to construe and apply the constitutional standard, between (1) a person who has an interest to protect the air, water, and natural resources or public trust , and (2) a defendant whose conduct has or is likely to "pollute, impair, or destroy" in violation of the constitutional standard. The court has only the power to grant declaratory judgement[28] as to whether or not the defendant's conduct has violated this standard, as developed by the courts, and grant a binding judgment or equitable relief. MCL 324.1701,1704. There is nothing on the face of the MEPA that requires or allows circuit courts to exercise powers over matters other than a "controversy" within the meaning of Art 6, § 1.

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[27] The federal ESA states that "any person may commence a civil suit" to enforce the ESA.

[28] A declaratory judgment must be based on an "actual controversy." MCR 2.605.

2. A Circuit Court Can Determine Whether A "Person" who maintains an action under the MEPA Has Alleged A "Controversy between adverse interests"

As part of the judicial power the courts have an inherent gate-keeping role to make sure that the matters it is called upon to decide are "controversies." As part of this role, courts have the power to fashion doctrines such as standing, mootness, and ripeness to make sure that courts time and energy are confined to the powers vested by the constitution. The principles of standing, therefore, are derived directly from the judicial power and definition of "controversies between adverse parties," questions of litigation and trials, and "binding orders and judgements." *Daniels, supra*; and this case can be decided on this basis.

As has been shown previously, the MEPA has all the elements of a "controversy." There are parties, plaintiff and defendant, there is a cause of action based on a standard of conduct derived directly from Art 4, § 52 of the Constitution. The circuit courts are granted jurisdiction and power to only adjudicate the cause of action and grant binding relief in the form of declaratory judgements and equitable relief. The circuit court may, as part of the gate-keeping role regarding "controversies," evaluate and ensure that a plaintiff has standing.

First, standing has been long recognized as a doctrine within the exercise of judicial powers. *House Speaker v Governor,* 443 Mich 560; 506 NW2d 190 (1993). Second, the legislature may "increase or diminish" jurisdiction so long as the power exercised by the courts remains within their judicial power. As explained above, Art 4, § 52 articulated a distinct paramount interest or concern of citizens in the air, water, and natural resources, and MEPA implemented the protection of this interest by creating a cause of action. The circuit courts, armed with the MEPA cause of action and their judicial powers under Art 6 § 1, in each case assure that the litigants and claim fall within the MEPA and the definition of "controversy." Applying doctrines of mootness, ripeness, and standing, all the circuit court has to do is determine whether the plaintiff has met the requirements to create a justiciable controversy under the MEPA.

It is up to the circuit court in each case to exercise judicial power to assure that the case as alleged and presented by plaintiff is a "controversy," including sufficient standing. Just what

a plaintiffs must allege to satisfy the requirement that their claim under the MEPA is a controversy is addressed in the following section.

3. To meet the requirements of a "controversy" Plaintiffs in a MEPA Action Should Show A Relationship of the Plaintiff and An Interest in the Air, Water, Natural Resources, or the Public Trust

Section 1701 and 1703(1) of the MEPA itself define a cause of action with litigants that is a "controversy between adverse parties" and requires "binding judgments or orders." Reading the MEPA together with the paramount public concern in the air, water, and natural resources to be protected from harm under Art 4, § 52, there are distinct elements of the action that must be alleged to satisfy the Act. To establish a sufficiently adverse interest under the MEPA, a plaintiff must show or allege:

(1) an identifiable interest related to the air, water, and natural resources, or public trust forming the subject matter of the suit;

(2) that a defendant's conduct has polluted, impaired or is likely to pollute, impair, or destroy such interest in the air, water, and natural resources or public trust; and

(3) that a declaratory or equitable judgment or order will result in some prevention or minimization of such actual or likely pollution, impairment, or destruction as alleged in plaintiff's complaint in the action.

Thus, even though MEPA grants broad standing to citizens, for the plaintiff to succeed there must be alleged in the complaint some actual or likely injury to an identifiable interest protected by the MEPA and Art 4, § 52.

Any standing test for the MEPA should be as broad as the "controversy" defined the MEPA itself. If a test is fashioned more narrowly than this, then this Court would risk invading the power and wisdom of the Legislature in adopting MEPA in response to the people's constitutional mandate of Art 4, § 52.

While perhaps defined more broadly by the MEPA, since the legislature can create causes of action that expand or diminish the common law, this above-described test is consistent with

enforcement actions by private citizens under the common law. For example, an individual may also enforce a public nuisance where they allege an interest "different in kind" from the public at large. *House Speaker, supra*; *White Lake Improvement Association*, 22 Mich App 262; 177 NW2d 473 (1970), *Indian Village Association v Shreve*, 52 Mich App 35; 216 NW2d 447 (1974), *Morse v Liquor Control Com'n*, 319 Mich 52, 58-59; 29 NW2d 316 (1948).

Beyond mandamus and public nuisance, Michigan courts also have long recognized the right of private citizens to enforce or protect a legal right that belongs to the public, so long as the citizen had an interest different in kind from the general public. *Ainsworth v Hunting & Fishing Club*, 153 Mich 185 (1908).[29] In *Ainsworth*, this Court held that a hunter or fishermen within navigable waters, in which the state and citizens through their sovereign had an interest, could legally enforce this public right even though he or she had no legal interest any different from other citizens. 153 Mich at 191-192.[30] For other public trust cases protecting a citizens general public right to use waters of the state, see, *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926) (public right to fish in navigable streams); *Superior Public Rights v Department of Natural Resources*, 80 Mich App 72, 82; 263 NW2d 290 (1977) (citizens'right in public trust resources is in the nature of property rights); *Trout Unlimited v City of White Cloud*, 195 Mich App 343; 489 NW2d 188 (1992).

It should be noted that the MEPA specifically protects "public trust" resources. MCL 324.1701, 324.1703(1), and a person who uses a navigable stream, lake, or other public trust resource, has standing to protect his or her interest in that right despite the fact it is held in common with the public at large. *Trout Unlimited, supra*. Under public trust law, the plaintiff need only allege a right of use of or interest in the public trust resource that is threatened.[31]

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[29]See generally, Vining, Joseph, *Legal Identity: The Coming of Age of Public Law* (Yale 1978); Sax, Joseph, *Defending the Environment*.

[30] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v Morton,* 405 U.S. 727, 738; 92 S Ct 1361; 31 L Ed 2d 636 (1972).

[31] In *Superior Public Rights v Department of Natural Resources, supra,*, the plaintiff non profit organization consisted of citizens who sought to enforce their public right to use and enjoy (continued...)

Thus, just because an interest is held by a large segment of the population, does not mean that the plaintiff lacks standing. A common understanding of Art 4, § 52, expressed through the will of the people of Michigan, is that it recognized a paramount public interest of each citizen is our State's air, water, and natural resources. This constitutional interest has been put into force as a cause of action and substantive duty by the Legislature. Citizens have an interest under the constitution and right under the MEPA to file causes of action to protect this interest and enforce the substantive duty.

Justice Scalia recognized himself the importance of giving force to the broad standing provisions of the legislative branch in *Bennet v Spears*, *supra,* and a citizen or person falls within the zone of interest of such a statutory provision the courts should defer to Congress.

> Our readiness to take the term "any person" at face value is greatly augmented by two interrelated consierations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"- ... Given these factors, we think the conclusion of expanded standing follows a fortiori from our decision in * * * *Traficante v Metropolitan Life Ins Co.*, 409 US 205, 93 Sup. Ct. 364 (1972), which held that standing was expanded to the full extent permitted under Art. III by Sec. 810(a) of the Civil Rights Act of 1968 ... The statutory language here is even clearer, and the subject of the legislation makes the intent to permit enforcement by everyman even more plausible. 52 US at 165-166.

The Michigan Legislature has created causes of actions in the nature of citizens suits to address a wide variety of social, commercial, consumer, and health problems.[32] So have the people expressly in the Constitution. The Legislature is vested with the power to create such actions under

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[31](...continued)
the public trust waters of Upper Marquette Harbor for fishing, boating, and swimming. The Court of Appeals recognized that plaintiff's members interest was "in the nature of" an interest in property.

[32]See MCL 14.321(1) Public Safety; MCL 15.270(1) Open Meetings; MCL 15.271(1) Open Meetings; MCL 324.11151(1) NREPA; MCL 445.55(1) Identity Protection; MCL 445.360(1) Pricing and Advertising Consumer Items; MCL 445.815(1) Advertisements; MCL 445.911(1) Consumer Protection; MCL 445.964(1) Rental-Purchase Agreements; MCL 445.1611(1) Mortgage Lending; MCL 445.1628(3) Lender Violations; MCL 445.1681(1) Mortgage Brokers; MCL 487.2070(1) Consumer Financial Services; MCL 493.77(4) Secondary Mortgage; MCL 493.112(3) Credit Cards; MCL 500.2080(10) Insurance; MCL 550.1619(3) Health Care; MCL 600.2938(2) Obscene Publications.

its general grant of power under Mich Const 1963, Art 4, § 1. This Court's recognition of this legislative power to expand actions and the persons who may bring them is heightened when a constitutional provision identifies an interest in the people that is to be protected, such as the people have done through Art 4, § 52 and the Legislature's enactment of the MEPA.

Thus, if a citizen as plaintiff or any governmental unit or entity qualifying as a "person" under Section 1701 shows a relationship to an the public trust or the interest in the air, water, or natural resources under the MEPA, the plaintiff has very clearly shown a sufficiently adverse interest as a party to satisfy the "controversy" requirement under the circuit court's exercise of judicial power and the Michigan Legislature's expanded standing of the MEPA to protect the environmental interest of citizens embraced by Art 4, § 52.

CONCLUSION AND RECOMMENDED RELIEF

Based on the above, this Court should hold that Section 1701 of the MEPA is constitutional and consistent with the Michigan Const 1963, Art 3, § 2.

Further, this Court should hold that Section 1701 of the MEPA, which provides that "any citizen may maintain an action for declaratory or equitable relief" to protect the paramount interest in the air, water, and natural resources, or public trust in those resources, under Art 4, § 52 of the Constitution, constitutes a "controversy" within the judicial power under Art 6, § 1 of the Constitution.

Additionally, this Court should affirm that broad standing is conferred upon citizens by the Legislature under the MEPA, but that such standing must at a minimum satisfy the action is a "controversy" that has been defined the Legislature in adopting the MEPA. The test to satisfy this requirement and, at the same time affirm broad standing, should be as follows:

(1) that an identifiable interest in the area of the air, water, and natural resources, or public trust forming the subject matter of the suit;

(2) allege that defendant's conduct has polluted, impaired or is likely to pollute, impair, or destroy such interest in the air, water, and natural resources or public trust; and

(3) that a declaratory or equitable judgment or order will result in some prevention or minimization of such actual or likely pollution, impairment, or destruction as alleged in plaintiff's complaint in the action.

Alternatively, this Court should uphold the constitutionality MEPA as a "controversy" consistent with Art 6, § 1 and Art 3, § 2, or avoid deciding the constitutional question at all, and remand this case to the Court of Appeals and/or the Trial Court for a determination of whether or not Appellees Conservation Organizations have shown sufficient facts in affidavits and allegations of their complaint to satisfy the standing test set forth by this Court.

Respectfully submitted by:

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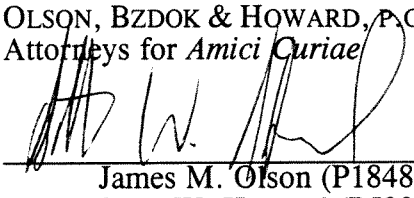

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